APPEAL NO. 030287
FILED MARCH 21, 2003

This appeal arises pursuant to the Texas Worker's Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). A consolidated contested case hearing was held on January 13, 2003. With regard to (Docket No. 1), the hearing officer determined that the appellant/cross-respondent (claimant) sustained a compensable occupational disease in the form of a repetitive trauma injury that resulted in a loss of the ability to hear high frequency sounds, with a date of injury of (date of injury for Docket No. 1). With regard to (Docket No. 2), the hearing officer determined that the claimant did not sustain a second compensable repetitive trauma injury with a date of injury of (date of injury for Docket No. 2). The claimant appealed, disputing the determination that he did not sustain a second compensable repetitive trauma injury with a date of injury of (date of injury for Docket No. 2). Respondent 1/cross-appellant (carrier 1) responded, maintaining that there is sufficient evidence to support the position that the proper date of injury is (date of injury for Docket No. 2), and that the hearing officer's determination that the claimant's date of injury is (date of injury for Docket No. 1), is in error. The appeal file did not contain a response from respondent 2 (carrier 2).

Carrier 1 cross-appealed, arguing that the determination that the claimant sustained a compensable occupational disease in the form of a repetitive trauma injury that resulted in a loss of the ability to hear high frequency sounds, with a date of injury of (date of injury for Docket No. 1), is in error. The appeal file did not contain a response from the claimant or from carrier 2.

DECISION

Affirmed.

We first address the claimant's appeal. Pursuant to Section 410.202(a), a written request for appeal must be filed within 15 days of the date of receipt of the hearing officer's decision. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal. Section 410.202(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 143.3(c) (Rule 143.3(c)) provides that an appeal is presumed to have been timely filed if it is mailed not later than the 15th day after the date of receipt of the hearing officer's decision and received by the Texas Workers' Compensation Commission (Commission) not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(c) must be satisfied in order for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 002806, decided January 17, 2001.

Commission records indicate that the hearing officer's decision was mailed to the claimant on January 16, 2003. The claimant, in his appeal, states that he received the hearing officer's decision on January 18, 2003. Applying Rule 143.3(c) the last day for

the claimant to mail his appeal was Monday, February 10, 2003, and the last day for the Commission to timely receive the appeal was Tuesday, February 18, 2003. The claimant's appeal contained a cover letter that stated that the appeal was mailed on February 4, 2003, but it was mailed to the address allegedly supplied by the field office, which was incorrect. The claimant's appeal, although timely mailed, was not received by the Commission until March 4, 2003. The claimant's appeal is therefore untimely because it was received after February 18, 2003. We note that the Commission's cover letter under which the hearing officer's decision was mailed gives the address to which an appeal is to be mailed as being:

APPEALS CLERK, HEARINGS
TEXAS WORKERS' COMPENSATION COMMISSION
POST OFFICE BOX 40669
AUSTIN, TEXAS 78704-0012

The claimant's appeal is untimely and cannot be considered.

Carrier 1 cross-appealed, arguing that the claimant failed to offer sufficient proof to establish that he sustained a compensable occupational disease in the form of a work-induced hearing loss. We have held that the question of whether an injury occurred is a question of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. The claimant had the burden to prove that he sustained damage or harm to the physical structure of his body, arising out of and in the course and scope of his employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. There was evidence presented which showed that the claimant has been exposed to loud noises in connection with his employment for over 28 years (as of the 1994 injury). There were test results in evidence from an audiologist who opined that the hearing impairment of the claimant is not "purely related to the loud noise." The claimant's treating doctor opined that with no other history of noise exposure, he would attribute the hearing loss the claimant has to his history of noise exposure at work. The carrier in its appeal correctly notes that to recover for an occupational disease which occurred as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). The Appeals Panel has stated that, at a minimum, proof of a repetitive trauma injury should consist of some presentation of the duration, frequency, and nature of activities alleged to be traumatic. Texas Workers' Compensation Commission Appeal No. 960929, decided June 28, 1996. In the present case the hearing officer was persuaded that the claimant provided sufficient evidence of a nexus between his employment and hearing loss due to the need for protective hearing equipment in the claimant's employment and the medical opinions in evidence.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find that there was certainly sufficient evidence to support the hearing officer's finding of injury in the present case.

We affirm the decision and order of the hearing officer.

The true corporate name of insurance carrier 1 is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

The true corporate name of insurance carrier 2 is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Terri Kay Oliver
Appeals Judge

_____
Edward Vilano
Appeals Judge